SPEECH ON MATTERS OF PUBLIC INTEREST AND CONCERN

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INTRODUCTION

Some of the most difficult problems in legal analysis involve concepts that are slippery and amorphous but indispensible to the adjudication of cases. The distinction between speech on matters of public interest or concern and speech that is not is one such concept. This vital distinction has proven difficult to apply on a consistent, noncontroversial basis. The concept may even qualify, under the logic of W.B. Gallie's classic article,[1] as an essentially contested concept. The distinction between public, general interest speech and other speech is especially vital when courts are deciding cases that may involve important social interests and fundamental constitutional rights. The focus of this Article will be on the judicial use of the distinction between speech that is a matter of public or general interest or concern and speech that is not. Courts sometimes blur this distinction by focusing on the matter or the general subject of the speech rather than on the speech itself.[2] For the sake of convenience, the distinction will be referred to as one between speech on matters of public interest or concern (MOPIC) and speech that is not (non-MOPIC). These abbreviations are merely for the sake of convenience, and are not intended to beg any interesting questions.

While the MOPIC versus non-MOPIC distinction was important to the classic Warren and Brandeis discussion of privacy rights,[3] only recently has it become central to the law of defamation and to the law of public employee discharge or other disciplinary actions allegedly based on the employee's protected speech. The central case in the defamation area is *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[4] and *Connick v. Myers*[5] is the central

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1. Gallie, *Essentially Contested Concepts,* 56 PROC. OF THE ARISTOTELIAN SOCIETY 167 (1956).

2. *See, e.g.,* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 31 (1971) (plurality opinion) ("the report of an event of 'public or general interest'") (citing Warren & Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 214 (1890)). *Cf., e.g.,* Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1563 (1986) (focusing instead on "whether the speech at issue is of public concern").

3. *See* Warren & Brandeis, *supra* note 2.

4. 472 U.S. 749 (1985) (plurality opinion).

5. 461 U.S. 138 (1983). Of course, the public interest or public concern nature of public employee speech does not dictate a favorable result for the employee. The employee might have beenterminated anyway for independent reasons. *See* Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). There must also be, under *Connick,* a balancing of legitimate free speech interests and the general interests of the employer in workplace discipline and efficiency.

case in the employee discharge area that was explicitly referred to in *Greenmoss*.[6]

In *Greenmoss*, the plaintiff sued Dun & Bradstreet for distributing an inaccurate credit report to the plaintiff's creditors. The plurality opinion in *Greenmoss* referred to public or to individual "matter[s]"[7] and "issue[s]"[8] but concluded by declaring that the award of presumed or punitive damages in the absence of any "actual malice" on the part of the libel defendant is not a violation of the first amendment so long as the speech does not involve matters of public concern.[9] In order to determine whether the allegedly libelous speech addresses a matter of public concern, the court must examine the speech's "content, form, and context . . . as revealed by the whole record."[10]

The dissent in *Greenmoss* disagreed with the plurality's characterization of the Dun & Bradstreet credit report on Greenmoss Builders as not being a matter of public concern.[11] More importantly, however, the dissent observed that the plurality had offered "almost no guidance as to what constitutes a protected 'matter of public concern.'"[12]

In the area of libel law, judicial reactions to the Court's MOPIC versus non-MOPIC distinction range from conceding its difficulty in application[13] to the more despairing characterization of the distinction as "amorphous and undefinable."[14] In the area of public employee dismissal, the reaction has been similar. No clear definition of public concern has been established,[15] and the courts have had substantial difficulty in determining when speech involves an issue of public concern.[16] More importantly, the distinction, or its underdevelopment, has resulted in substantial numbers of inconsistent,

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6. 472 U.S. at 759.

7. *Id. See also* Meiklejohn, *Public Speech and Libel Litigation: Are They Compatible?*, 14 HOFSTRA L. REV. 547, 551-52 (1986) (focusing on subject of general or public interest under *Rosenbloom*).

8. 472 U.S. at 759.

9. *Id.* at 763 (thereby limiting the potential scope of such cases as New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and Gertz v. Robert Welch, Inc., 428 U.S. 323 (1974)).

10. 472 U.S. at 761 (quoting *Connick*, 461 U.S. at 147-48). This is an inquiry of law, rather than fact. *See Connick*, 461 U.S. at 148 n.7, 150 n.10.

11. 472 U.S. at 786 (Brennan, J., dissenting).

12. *Id. See also* Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U.L. REV. 241, 258 (1987) (standards for whether a particular speech addresses a matter of public concern as being the "chief question left unanswered by *Greenmoss*").

13. *See, e.g.*, Sisler v. Gannett Co., 104 N.J. 256, 268, 516 A.2d 1083, 1089 (1986) (quoting Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 144, 516 A.2d 220, 229 (1986)).

14. Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103, 1111 (Colo. 1982) (en banc) (Erickson, J., dissenting). *See also* Meiklejohn, *supra* note 7, at 551 (referring to the Court's "great difficulty in defining the concept of 'public'" in this context).

15. Allen v. Scribner, 812 F.2d 426, 430 (9th Cir. 1987).

16. McKinley v. City of Eloy, 705 F.2d 1110, 1113 (9th Cir. 1983).

irreconcilable decisions in the frequently litigated public employee speech-based dismissal cases.[17]

Determining whether or not speech is on a matter of public interest is unavoidably problematic. The distinction invites an unusually high percentage of subjective and arbitrary judicial decisions within a wide border zone of close cases dividing the categories. The litigated cases tend to cluster in this wide indeterminate "close case" area separating MOPICs from non-MOPICs, resulting in large numbers of unpredictable case outcomes. Unfortunately, this difficulty cannot be the sole consideration in deciding whether to modify or dispense with the distinction between public interest and nonpublic interest speech.

Particularly in sensitive areas involving important free speech rights, there is a reluctance to accept easier-to-use substitutes for these speech categories, even if the categories of MOPIC and non-MOPIC speech are themselves difficult to apply. In addition, there exists a reluctance to trade off validity or accuracy of a distinction for greater consistency or reliability. The MOPIC versus non-MOPIC distinction appears to be indispensable. Given our basic consensus with regard to the underlying values and purposes of the free speech clause,[18] it is a logically central distinction, for which there are no good substitutes.

The Supreme Court has long held that not all kinds of speech are equal in constitutional importance because not all kinds of speech implicate with equal depth the central values thought to underlie the first amendment.[19] While speech on matters of purely private concern is not thought to be utterly outside the scope of the first amendment,[20] MOPIC speech is thought to be at the heart of the first amendment and receives the most stringent constitutional protection.[21] The Supreme Court has stated that "speech

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17. *See* Note, *The Public Employee's Right of Free Speech: A Proposal for a Fresh Start,* 55 U. CIN. L. REV. 449, 449 (1986) [hereinafter Note, *The Public Employee's Right of Free Speech*] ("The lower federal courts have had difficulty applying the Supreme Court's balancing test. Therefore, the decisions in this area are often times irreconcilable."); Note, Connick v. Myers: *New Restrictions on the Free Speech Rights of Government Employees,* 60 IND. L.J. 339, 358-59 & n.143 (1984-1985) [hereinafter Note, *New Restrictions on the Free Speech Rights*] (characterizing the distinction as unworkable; collecting assertedly mutually inconsistent federal court cases).

18. Despite undeniable differences in emphasis, see Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. REV. 964 (1978); Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUND. RES. J. 521; Bloustein, *The Origin, Validity, and Interrelationships of the Political Values Served by Freedom of Expression,* 33 RUTGERS L. REV. 372 (1981); Perry, *Freedom of Expression: An Essay on Theory and Doctrine,* 78 NW. U.L. REV. 1137 (1984); Redish, *The Value of Free Speech,* 130 U. PA. L. REV. 591 (1982). If there is any single article that defines themainstream in this area, though, it is probably Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877 (1963).

19. *See Greenmoss,* 472 U.S. at 759-60.

20. *Id.* at 760; *Connick,* 461 U.S. at 146-47.

21. *See Greenmoss,* 472 U.S. 749; *Connick,* 461 U.S. 138; NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980).

concerning public affairs is more than self-expression; it is the essence of self government."[22] Non-MOPIC speech is not so central and accordingly receives less protection.[23]

The MOPIC versus non-MOPIC distinction thus reflects consensual judgments as to the scope and purposes of, and values underlying the free speech clause. Throughout much of the remainder of this Article, the most obvious possible substitutes for this distinction will be considered and ultimately rejected, on grounds such as ideological bias and susceptibility to partisan abuse. The distinction cannot be dispensed with in favor of a more convenient, less controversial distinction which does not so directly address fundamental free speech value concerns.

This is not to suggest that applying the MOPIC versus non-MOPIC speech distinction is invariably difficult in practice. Some cases can be easily resolved.[24] The obvious cases, those which clearly involve MOPIC or non-MOPIC speech, can be resolved on just about any reasonable rationale of the distinction involved. With regard to those clear cases, there is no need, therefore, to compare and rank the alternative conceptions of how the MOPIC distinction should be drawn. Only a few of the reported cases, however, involve clearly MOPIC or non-MOPIC speech. What is needed, therefore, is a theory for the unavoidably close, difficult, middle ground cases that are tried and appealed.

The middle ground cases are allowed to be decided on, what might be thought of as, strategic grounds due to the unavoidable closeness and difficulty of the MOPIC or non-MOPIC issues involved. It violates no one's rights, and is sound policy, to decide issues of MOPIC speech *vel non,* in the middle ground close cases, with an eye toward promoting the range of values or purposes underlying speech rights.[25]

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22. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964), *quoted in* both *Greenmoss,* 472 U.S. at 759 and *Connick,* 461 U.S. at 145.

23. *Greenmoss,* 472 U.S. at 759; *Connick,* 461 U.S. at 146-47.

24. Although the Supreme Court did not reach the issue, the congressional testimony of Ernest Fitzgerald asserting two billion dollar cost overruns on the C5-A military transport planes, among other matters, would clearly qualify as speech by a dismissed public employee on a matter of general or public interest and concern, however this category was formulated. *See* Nixon v. Fitzgerald, 457 U.S. 731, 734 (1982) (former management analyst with the Department of the Air Force sued President Richard Nixon for retaliatory discharge during department reorganization following unfavorable congressional testimony). It is an easy case because a contrary result—finding that Fitzgerald's speech was essentially on a matter of personal or private interest, however motivated—would be so implausible as to have no effect other than to call the theory generating the contrary result into serious question, and because a wide variety of formulations or approaches to the distinction will give the same result. For another easy public employment discipline case, but one easily classified as a case not involving speech on a matter of public interest, see Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir.) (per curiam) (teacher's unwillingness to share a job with another teacher), *cert. denied,* 469 U.S. 823 (1984).

25. In a convenient, if not fully inclusive, summary of these values, Professor Emerson lists assuring individual self-fulfillment, the pursuit or attainment of political truth, participation in

Specifically, this Article seeks to increase consistency and predictability in this range of close cases in a way that will promote first amendment values by means of judicially structured incentives for potential speakers in both public employee speech-based dismissal cases and in defamation cases. The basic concept at the heart of this theory as applied to these middle range cases, is to ask whether the speaker—the alleged defamer or the dismissed public employee—could, under all the circumstances, have made at a practical and low cost, the judicial issue of MOPIC *vel non* easier to resolve.

Costs for the speaker, under our theory, include those factors which involve the distortion of any political message the speaker cares to convey, as well as the financial costs borne by the speaker. In an ideologically neutral way, the potential scope or breadth of the speaker's remarks can be considered, as well as the nature and size of the speaker's potential audience. If all else is equal, it is more advantageous in terms of free speech values, on which the litigant is in some sense seeking to rely, if the litigant's speech is more general in its implications, rather than more narrow or particular; left to be generalized only by the listener. It is also more advantageous in terms of free speech values, if the speech is directed to more than one person, if for no other reason than that democratic decision making requires[26] broader public discussion.

The all else equal qualifications cover a large number of important factors, and the costs faced by a speaker who contemplates "broadening" his speech can take a variety of forms. We have no desire to penalize, for example, a litigant because the first, preliminary draft of a speech was not intended for any audience, or because the litigant chose to pursue an employment-related matter first through authorized channels, rather than immediately firing off a letter to the editor, or speaking to a newspaper reporter on the basis of unripe, undocumented suspicions.

A number of possible objections are dealt with below, in the context of particular cases. For the moment, it may suffice to note that it is undesirable that a judge evaluate the importance or the cogency of the speech at issue. The risk of decisions on the basis of ideological bias in this area outweigh any possible advantages. In addition, the judge should not be asked to answer the unanswerable question of whether the speech at issue was, as uttered, general or not general in some absolute sense. Under our analysis, the free speech clause should offer protection not only to ambitious, sweeping abstraction and theory, but, in the common middle range of cases, to those speakers who have done their reasonable, cost-effective best under the circumstances to "generalize" the content and audience of their allegedly protected speech. The term generalizing does not mean to identify or encourage making a speech simply more vague, or robbing a speech of partic-

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democratic decision making, and maintaining abalance between social stability and change. *See* Emerson, *Toward A General Theory of the First Amendment,* 72 YALE L.J. 877, 878-79 (1963).

26. *See id.*

ularity, concreteness, and detail. Instead the term generalizing means the drawing of broader inferences or of more encompassing conclusions by the speaker or audience. It is instead simpler to say whether a speaker, given her actual abilities, could have easily further generalized the speech, with the qualifications outlined above. Under the MOPIC distinction, the speaker, rather than the creative audience, is the first to generalize or draw out the implications he intends the speech to convey.[27] There is, however, a limit to how far we will require the speaker to generalize her speech before it becomes a clear case of speech on a MOPIC.

Certain anomalies are admittedly possible under the MOPIC/non-MOPIC approach. For example, imagine two separate speech instances that are neither easy MOPICs nor easy non-MOPICs. Both are therefore within the middle range cases that result in of doubtful, unpredictable decisions such as the cases discussed above. Suppose that speech instance A is closer on the spectrum to being a clear MOPIC speech than speech instance B. But suppose that B, but not A, is speech that cannot be further generalized at low cost under the circumstances. This would mean, in effect, that a judge could say of A, but not of B, that the speaker could easily have further generalized his message, or could have easily expanded his potential audience, but failed to do so. Under this approach, B, and not A, would be ruled speech on a matter of general or public interest and concern.

This result, though, is hardly upsetting. It depends upon the assumption that the courts can otherwise begin to make principled, accurate, consistent decisions in the common middle ground cases, a development which shows no signs of arising. The approach outlined here is fair in that it takes speakers as they are, with their limitations, who want to take advantage of the free speech clause, and asks only that they have walked through any open doors toward fuller implication of the values underlying the free speech clause. The incentive based approach is further justified by the frequent defense raised by speakers to the effect that they should be considered experts on the subject in question, informing the public on matters of potential public significance.[28] It is not amiss to ask experts not to simply disdain opportunities to couch their message more impersonally, or more broadly, in view of the interests they themselves assume to be at stake.

The approach outlined here also has the virtue of avoiding a motive inquiry by courts in difficult cases, where the speaker's motive is often

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27. It may be that a person's demanding something for himself commits him to the more general implication that everyone relevantly similarly situated is similarly so entitled. See the development of similar conceptions of moral reasoning in M. SINGER, GENERALIZATION IN ETHICS 17, 19-20, 24 (1961) and, over time, in R. HARE, THE LANGUAGE OF MORALS (rev. ed. 1961); R. HARE, FREEDOM AND REASON (1963); R. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT (1981). Under the outlined theory, the trick for the speaker is not simply to say something that can be further generalized, but to bump up against some substantial obstacle to further generalization.

28. *See* Pickering v. Board of Educ., 391 U.S. 563, 572 (1968); Note, *The Public Employee's Right of Free Speech, supra* note 17, at 454.

mixed, consisting of a desire to promote both purely personal as well as more impersonal interests.[29] Equally important, our incentive based approach reduces the risk that the uncertainties in our middle ground cases will tend to chill constructive critical speech,[30] along with reducing the uncertainties themselves. A speaker who wants to be classified as speaking on a matter of public interest, if her case is otherwise close, can formulate her speech in such a way as to bump up against detectable obstacles to further generalization of content and audience. The incentive approach thus lends some measure of predictability to judicial results,[31] thereby reducing the realistic basis for any chilling effect of the protection-worthy speech that this approach encourages.

I. THE LIMITED CONTRIBUTION OF CONCEPTUAL ANALYSIS

However the concept of a matter of public or general interest or concern is formulated, the distinction between the public and the private or personal, and between the various senses of public interest, are unavoidable. Such distinctions are notoriously problematic, but they can help crystalize precisely what ought to be encouraged in order to promote and defend the values underlying freedom of speech.

It has been rightly recognized that "disputes over the *boundaries* between the 'public' and 'private' realms are among the central issues of public moral discourse."[32] Private and public activities may be thought to be in fact inseparable.[33] Private and public may be thought to be simply alternative aspects of the same interest.[34] The more general public versus private distinction has drawn increasing criticism.[35]

There is much that rings true in Professor Duncan Kennedy's well known discussion of the conceptual disintegration of the public versus private

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29. *Cf. Connick*, 461 U.S. at 148 (undertaking a rather subtle inquiry into the discharged speaker's subjective motivations); Note, *New Restrictions on the Free Speech Rights*, *supra* note 17, at 360-61.

30. *See* Note, *New Restrictions on the Free Speech Rights*, *supra* note 17, at 340.

31. The proposed theory cannot ignore the potential for unpredictability because speeches of identical content, subject matter, and audience, may or may not be accorded MOPIC status, depending upon the speaker's ability at the time to easily generalize. Context makes a difference on most theories, and this is clearly not a case in which the ready generalizability theory treats like cases as unlike. That one speaker of the same speech could have readily generalized, under the circumstances, and another could not have generalized his speech is simply a constitutionally relevant distinction between the cases.

32. Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 177 (1986) (emphasis in original).

33. *See* Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1294-96 (1984); Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987).

34. *See* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 981 (1987).

35. *See* Seidman, *supra* note 33, at 1007.

distinction.[36] Even if it is true, however, that "one simply loses one's ability to take the public/private distinction seriously as a description, as an explanation, or as a justification of anything,"[37] it is hardly clear what follows from this line of reasoning by analyzing the cases examined in this Article. The distinction, in the abstract, between the public and the private may in fact be prone to unravel. Adjectives are not employed, however, simply in the abstract. The terms public or private, in this sense, have referents. There is no inherent dynamic of staged decline in the concept of, for example, a public telephone. An individual can walk into a drugstore today, inquire after a public phone, and provoke no greater demand for clarification today, or tomorrow, than fifty years ago. If the concept of public telephone is not pellucid and sharp-edged, it is at least serviceable and can be widely employed in consistent fashion. The question then becomes whether public and private interests are more like the concept of public and private phones, or like the concept of public and private in the abstract.

For the skeptics, the concept of a public interest, or the public interest, is hardly more tractable than how Professor Kennedy would view the broader public-private distinction. It has been said, for example, that "there is no public-interest theory worthy of the name . . . ."[38] More specifically, the argument has been made that judges are unable to make principled distinctions between public interests and private interests.[39] The concept of public interest may indeed be in a "state of confusion,"[40] but it may equally clearly be indispensable, in light of our collectively accepted values.[41] Fortunately, the concept of the public interest need not be entirely clear and unequivocal in order to do some practical work, and it need not be made so in order to make progress along the lines suggested by this Article.

One crucial observation, validated by examining the relevant case opinions, is that the concept of public interest may be used in some contexts in a

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36. *See generally* Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). If, for example, the term "political" is to be used as broadly as Professor Perry contends it must, one's reaction may be no less a sense of the decline of the utility of the concept of the political than a sense of pathbreaking liberation. *See* Perry, *supra* note 18, at 1160. At such points, one turns with profit to Kennedy's essay.

37. Kennedy, *supra* note 36, at 1357.

38. G. SCHUBERT, THE PUBLIC INTEREST 223 (1960). For someattempts to sort out conceptions of the public interest in connection with public interest law, see Weisbrod, *Conceptual Perspectives on the Public Interest: An Economic Analysis*, in B. WEISBROD, J. HANDLER, & N. KOMESAR, PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 4, 26-29 (1978).

39. Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 925 (1987).

40. V. HELD, THE PUBLIC INTEREST AND INDIVIDUAL INTERESTS 18 (1970). Some order may be rendered out of the apparent chaos by recognizing that the notion of the public, or of the public interest, may be essentially contested in the sense described by W.B. Gallie. *See* Gallie, *supra* note 1, at 169. The "public interest" may well be among those "concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users." *Id.* at 169. For Gallie's list of criteria for recognizing essentially contested concepts, see *id.* at 171-72.

41. *See* V. HELD, *supra* note 40, at 18; R. FLATHMAN, THE PUBLIC INTEREST 13 (1966).

subjective sense—what does the public actually care about, or concern itself with?[42] "Public interest," however, is also used in a more objective sense, in which something may be a matter of public interest even if no one, or only a few people, happen to recognize it as such, or subjectively care about the matter.[43] For example, an obscure scientist may draft an early paper on the depletion of the ozone layer, or an obscure political group may publish its radical manifesto. Both are matters of public interest, whether or not the public, or any significant segment of the public, cares about either the speech or the subject matter.

The recognizable free speech values[44] may be implicated by at least some speech on matters of public interest in the subjective sense. It is equally clear, however, that such free speech values may be deeply implicated by some speech that concerns a matter of public interest in only the normative or objective sense. A contrary result would mean that a government that successfully brainwashed or intimidated the public into indifference with regard to political matters could rightly claim that discussion of such matters was then not on any matter of public interest. Dissenting speech would, on such a theory, fail the tests of *Connick* and *Greenmoss,* as the speech would not draw significant attention and comment. Any sensible theory of free speech must pose greater problems for a totalitarian regime than that.

The role of the more objective sense of public interest should emphasize the potentially misleading quality of the more subjective formulation of matters of public concern. It is true that cases such as *Connick* and *Greenmoss* refer more commonly to public "concern" rather than to public "interest." The logic of these two cases commits them, however, to attend to more than merely subjective concerns of the public. Both the Supreme Court and lower federal courts have treated public concern as synonymous with public interest.[45] Even where the Court refers to "speech on matters of

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42. *See* R. FLATHMAN, *supra* note 41, at 16-17. It is in this sense that the alleged restaurant behavior of a celebrity such as Carol Burnett may be a matter of public interest. *See* Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed,* 465 U.S. 1014 (1984). *But see* Meiklejohn, *supra* note 7, at 557 (discussing arguable public interest implications of defendant's speech for Burnett's anti-alcoholism activities).

43. *See* R. FLATHMAN, *supra* note 41, at 17; Sorauf, *The Conceptual Muddle,* in NOMOS V: THE PUBLIC INTEREST 183, 186 (C. Friedrich ed. 1962).

44. *See supra* note 25.

45. *See, e.g.,* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (test formulation in public employee discharge case focusing on the right to comment on matters of public interest); Altman v. Hurst, 734 F.2d 1240, 1244 (7th Cir.) (plaintiff employee's speech did not involve matters of public interest), *cert. denied,* 469 U.S. 982 (1984); Collins v. Robinson, 568 F. Supp. 1464, 1468 (E.D. Ark. 1983) (citing the public interest language from *Pickering*), *aff'd per curiam,* 734 F.2d 1321 (8th Cir. 1984). The antithesis of MOPIC speech is often thought to be speech that seeks to promote only personal or individual interest, in an evidently objective sense. *See* Rowland v. Mad River Local School Dist., 730 F.2d 444, 449 (6th Cir. 1984) (petitioner was fired when she revealed her bisexual preferences), *cert. denied,* 470 U.S. 1009 (1985). While the courts sometimes use the term "interest" in an arguably subjective sense, they may focus narrowly on more attention-independent concepts. *Compare* Wilson v. City of

public concern,"[46] it is evident that the Court desires to protect "speech that matters" or speech concerning "the legitimacy of the political process,"[47] whether or not the speech is popularly accepted, or whether or not the speech rouses the attention of the media, or of any significant element of the public.

The Court would prefer to inquire into not whether the speech itself matters, but, as a minimum improvement, whether the subject of the speech matters. The latter inquiry, though still controversial, is somewhat less subject to ideological abuse. It is easier to say that speech from an unpopular political viewpoint does not matter than it is to say that its subject—the legitimacy of the political process, for example—does not matter. Similarly, any judicial inquiry into whether the speech is important, or even on an important issue or concern, should be avoided. While an "important/unimportant" distinction has some judicial currency,[48] the potential for arbitrary or politicized use of such a classification renders it unworkable.[49]

To the extent that courts may prefer to think in terms of matters of public interest, rather than matters of public concern, they should, from the perspective of promoting and defending free speech values, construe public interest in a broad sense. Professor David Braybrooke has pointed out, for

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Littleton, 732 F.2d 765, 769 (10th Cir. 1984) (formulation of a topic of general interest to the public) *with* Greenberg v. Kmetko, 811 F.2d 1057, 1061 (7th Cir.) (focusing on the existence of speech on a matter of public importance), *reh'g granted, vacated en banc,* 820 F.2d 897 (7th Cir. 1987).

In the libel area, the Court has similarly used the termspublic interest and public concern interchangeably. *Compare* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971) (plurality opinion) (speech refers to a matter of public or general interest) *and* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1973) (issues of general or public interest) *with Rosenbloom,* 403 U.S. at 44 (plurality opinion) (speech issues of public or general concern) *and Greenmoss,* 472 U.S. at 762 (plurality opinion) (focusing on whether or not a matter of public concern existed, but opposing this to "speech solely in the individual interest of the speaker and its specific business audience.").

The Court's most recent formulation in the libel area refers to "speech on matters of public concern," but seeks to protect, *inter alia,* speech on "the legitimacy of the political process," on the grounds that such speech clearly "matters." Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1565 (1986). The latter considerations are more independent of public attitude. For a sample of recent libel cases using in form or effect a public interest formulation, see Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 533 (10th Cir. 1987); Bagley v. Iowa Beef Processors, Inc. (*In re* IBP Confidential Business Documents Litigation), 797 F.2d 632, 645 (8th Cir. 1986) (public concern formulation, but defined in terms of potential impact beyond the parties), *cert. denied,* 107 S. Ct. 1293 (1987); Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 145, 516 A.2d 220, 230 (1986).

46. Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1565 (1986).

47. *Id.*

48. *See* Greenberg v. Kmetko, 811 F.2d 1057, 1061 (7th Cir.), *reh'g granted, vacated en banc,* 820 F.2d 897 (7th Cir. 1987); Meiklejohn, *supra* note 7, at 556; Note, *The Public Employee's Right of Free Speech, supra* note 17, at 454; Note, *The Evolution of a Public Issue:* New York Times *Through* Greenmoss, 57 U. COLO. L. REV. 773, 775 (1986).

49. *See* Schauer, *"Private" Speech and the "Private" Forum:* Givhan v. Western Line School District, 1979 SUP. CT. REV. 217, 231 (1980).

example, that some issues—desegregation or slavery versus emancipation—are discussed and debated in terms of human rights, the demands of justice, or freedom, rather than through consideration of the public interest.[50] Narrowly conceived, the public interest may seem too calculative or merely too aggregative to capture what is at stake in such debates. Such matters, whether anyone is actually concerned about them or not, must count as MOPICs on any credible theory.

While public interest should be broadly construed in this sense, the aim to promote and defend the values underlying the free speech clause may lead to a decline in application of the term in some cases in which it would seem literally applicable. Media gossip about celebrities, for example, is often a subject in which much of the public happens to take a temporary actual subjective interest or concern.[51] If such gossip is, and is intended to be, merely entertaining, without any implication for any public issue or potential public issue, then there is a case to be made for declining to recognize such speech as speech on a matter of public interest and concern. One should consider the classic fusillade of Warren and Brandeis:

> [T]he supply creates the demand . . . . Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people . . . . Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down . . . , no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling.[52]

Warren and Brandeis show few qualms about presuming to distinguish the important from the unimportant. While this is a course not without risk, it can be said in their defense that they are not seeking to distinguish important from unimportant political viewpoints, or issues. They would not claim for themselves, or entrust in others, the power to neutrally and reliably sort out important from trivial political ideas. Some judgments as to relative importance in the realm of public policy are, however, both defensible and inevitable. Generally, a constitutional right is more judicially important than a conflicting nonconstitutional right or claim. The values commonly thought to underlie the free speech clause[53] may reasonably be said to be, for free speech purposes, more important than other, unrelated values.

Even true mere gossip of the sort decried by Warren and Brandeis may be said to not significantly promote, or in fact to inhibit, the realization of the basic purposes underlying the free speech clause, even if multitudes happen to take an interest in the matter. It is difficult to imagine how mere

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50. *See* Braybrooke, *The Public Interest: The Present and Future of the Concept*, in NOMOS V: THE PUBLIC INTEREST 129, 131 (C. Friedrich ed. 1962).

51. *See* Warren & Brandeis, *supra* note 2, at 196.

52. *Id.*

53. *See supra* note 25.

gossip promotes self-development, contributes to the pursuit of political truth, furthers democratic decision making, helps balance social stability and change, or restrains governmental tyranny, any more than a wide variety of other activities not protected by the free speech clause.[54]

Rather than dwell upon this unsympathetic point, we may note instead that there is one other question on which some progress can be made at the conceptual level. This is whether speech that is economic or commercial in content, or that is about some commercial matter, can count as speech on a matter of public interest. This question cannot be answered sensibly in the abstract. One cannot simply take an instance of speech, see what broad type or category the speech falls into, and grant or deny the speech MOPIC status on that basis. One should instead, in applying the theory outlined here, look to the breadth or narrowness of the particular speech, as actually formulated by the speaker. In a close case, it should be determined whether the speech could have been further generalized, under the circumstances, by the speaker.

Merely being able to characterize the speech in question as economic or commercial fails to indicate the constitutional importance of the speech.[55] More specifically, it is of little aid in sorting out speech on matters of public interest from speech that is not on a matter of public interest. An economic or commercial speech category could, for example, encompass speech on everything from an American president's decision to run a large budget deficit in order to suppress additional social spending demands, to an isolated individual's own modest, short term, narrow pecuniary interests.

Focusing on the subject matter of the speech, rather than on the speech itself, encourages the judicial error of focusing on the category of the speech, with the category being taken by the court at its broadest, most expansive level. This error is illustrated by the recent declaration of the New Jersey Supreme Court in *Dairy Stores, Inc. v. Sentinel Publishing Co.*,[56] that "matters of public interest include such essentials of life as food and water."[57] The court reasoned simply that "[a]s an essential of human life, drinking water is a paradigm of legitimate public concern. For this decision, it suffices to conclude that drinking water is such a subject."[58]

It is possible to do better than this, even without any judicial inquiry into the importance or cogency of the particular speech at issue. There is a detectable difference in level of generality of implication between "the town's only drinking well is polluted," and "this particular bottle of mineral water

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54. *See supra* note 25.

55. *Cf.* Note, *The Evolution of a Public Issue, supra* note 48, at 788 (contending that in *Greenmoss,* the "most important factor to the Court was the factual, economic content of the report").

56. Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 134, 516 A.2d 220, 230 (1986).

57. *Id.*

58. *Id.*

was flat." It need not be determined whether the speech may be easily generalized to establish that these two statements, although they both address a subject essential to human life, need not be considered equally as speech on matters of public interest, in any context.

This skepticism as to the usefulness of broad categorization of a speech as economic or commercial in order to resolve whether the speech is on a matter of public interest does not imply, of course, that economics and commerce are alien to free speech values. Free speech protection rightly extends beyond the realm of the political, narrowly conceived.[59] One reason for this is that for many or all citizens, speech about some economic or commercial matters may contain a considerable breadth of implication.

The reasoning of the recent Supreme Court decision in *Greenmoss*[60] should be viewed with suspicion because the decision tends to exclude the commercial from the realm of matters of public interest.[61] One portion of the *Greenmoss* plurality's reasoning was that Dun & Bradstreet's credit report, falsely reporting the bankruptcy of Greenmoss Builders to five subscribers on the stipulation that the report was to be disseminated no further, was classifiable as "hardy" speech.[62] It was thought to be "hardy" speech, in the sense that the speech was less likely to be deterred by the threatened effects of state libel law, since it was "solely motivated by the desire for profit."[63]

The plurality's theory was that profit-motivated speech is less likely to be deterred than speech from other motives.[64] This theory, despite judicial acceptance,[65] does not carry sufficient plausibility to help with the MOPIC distinction. Common sense suggests the possibility that speech motivated by principle, as opposed to profit, may often be hardier. Ideological or religious commitment, unto the extreme of martyrdom, might be crudely defined in terms of the willingness of the speaker to risk substantial state imposed costs for speaking. Much profit-driven speech, however, may be barely worthwhile to the speaker, even in the absence of additional state regulation. It should be expected that profit-driven speech would tend to be deterred, or in fact

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59. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41 (1971) (plurality opinion); Meiklejohn, *supra* note 7, at 554-55.

60. *See Greenmoss,* 472 U.S. at 762-63. For a representative commentary on *Greenmoss,* see Comment, *Punitive Damages in Actions for Libel: The "Public Concern" Test is Revived, or the Resurrection of* Rosenbloom, 32 LOY. L. REV. 521 (1986).

61. This is not to suggest that the *Greenmoss* plurality would be likely to find a coal industry statement broadly disclaiming responsibility for acid rain to not be speech on a matter of public interest, or a gasoline company ad discussing the topic of energy conservation.

62. *Greenmoss,* 472 U.S. at 762.

63. *Id.*

64. *Id.* (citing the leading commercial speech case, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976)). *See also* Langvardt, *supra* note 12, at 250; Note, *The Evolution of a Public Issue, supra* note 48, at 789.

65. *See, e.g.,* Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 534 (10th Cir. 1987) (commercial credit reports are hardy speech, unlikely to be deterred by state regulation).

to cease, in situations where the anticipated costs exceed the marginal revenues anticipated,[66] where the profit-motivated speech qualifies as a public good,[67] and where it does not.[68]

The assumption that profit-driven speech tends to be relatively hardy, therefore, is doubtful. There is no need to overreact by being oversolicitous of all commercial speech. It has been argued, for example, that "there is a high degree of public interest in the kind of information obtained"[69] in credit reports. The point is that courts easily can and should look beyond the kind of speech involved—e.g., a credit report—to the actual and potential scope of the audience and the message. At least some credit reports—perhaps leaving unchanged the credit status of a small firm in a big city, where the audience for the credit report is increasingly small—involve speech that is simply not on a matter of public interest.

The limited circulation of a credit report is a legitimate consideration that is entitled to some weight in the decision as to whether the credit report should qualify as speech on a matter of public interest.[70] Limited circulation of an idea, or even its purely private memorialization, does not necessarily bar MOPIC status to the speech.[71] If all other factors are equal, however, the larger the percentage of the relevant potential audience that the speaker chooses to address,[72] the more constitutionally significant the speech becomes.[73] If for no other reason, because broader dissemination implies a chance for wider participation by a greater audience, in democratic decision making, and perhaps even a greater chance that the speech's contribution to the search for political truth will be recognized.[74] Thus it is an overstatement to conclude, as the Tenth Circuit has in *Sunward Corp. v. Dun & Bradstreet, Inc,*[75] a recent libel case, that "the reports in *Greenmoss* and 340 reports here have no constitutional significance."[76] The scope of intended audience is of some weight under this theory, though perhaps not of decisive weight in the Tenth Circuit case.

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66. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW ch.1 (3d ed. 1986).

67. *See* Posner, *Free Speech in an Economic Perspective,* 20 SUFFOLK U.L. REV. 1, 20-23 (1986).

68. Even if a speaking corporation is able to obtain payment for the social benefits created by its profit-driven speech, the speech may well be on a matter of public interest. An example might be one oligopolist's reporting that all of the production of a fellow oligopolist has been poisoned.

69. Langvardt, *supra* note 12, at 256.

70. *Cf. id.* (arguing for the irrelevance of such a consideration).

71. *See id.*

72. *See supra* note 25.

73. It may be too costly for Dun & Bradstreet to broaden its audience for its speech on matters of potential public interest, in light of its contractual commitments to its subscribers, and the commercial absurdity of doing so in this situation.

74. *See supra* note 25.

75. Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 533 (10th Cir. 1987).

76. *Id.*

Overall, those who have expressed anxiety over the Court's refusal to find speech on a matter of public concern in *Greenmoss* can take some comfort from the developing case law. Even in the face of *Greenmoss,* lower courts recently have found speech that is largely about economic or commercial matters is speech on a matter of public interest. These recent cases involve such matters as the propriety of a bank's loans to its former president and founder,[77] a magazine's loosely described "investment advice" about a rival investment opportunities magazine,[78] a local timeshare condominium controversy where the libel plaintiff was simultaneously running for town council,[79] and newspaper articles describing the financial dealings of private plaintiffs who were then the subject of numerous regulatory and law enforcement investigations.[80] There evidently has been no judicial rush to conclude that the presence of economic or commercial subject matter elements disqualifies the speech at issue from MOPIC status.

II. Applying the Ready Generalizability Test to the Public Employee Discipline Cases

The number of cases in the federal appellate courts in which a public employee has sought redress for being disciplined allegedly because of what the employee asserts to be speech on a matter of public interest is quite substantial and is growing rapidly. Here, the ready generalizability speech test can only be illustrated rather than fairly tested. There will be some public employee speech dismissal cases which can be easily decided and in which the particular theory used to reach the result, against or in favor of MOPIC status, will be largely immaterial.[81] There are no recent obvious cases in this sense where the court found the speech to be on a MOPIC, and the ready generalizability theory, if applied, would have suggested a contrary result. There is, however, one case in which the speech could have been determined as a MOPIC under any theory, but the court, contrary to all logic, failed to find the speech to be on a MOPIC. The best that can be hoped for is that this case is simply a rare aberration, defensible on no cogent theory.

This single incongruous case, *Mings v. Department of Justice,*[82] may best be explained as a judicial overreaction to unattractive facts. The petitioner in *Mings* had been removed in 1985 from his job as a border patrol agent in Lubbock, Texas.[83] The petitioner's removal was based in part on the

77. Sisler v. Gannett Co., 104 N.J. 256, 516 A.2d 1083, 1089 (1986).

78. J.F. Straw v. Chase Revel, Inc., 813 F.2d 356, 362 (11th Cir. 1987).

79. McCabe v. Rattiner, 814 F.2d 839, 843 (1st Cir. 1987).

80. Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103, 1104, 1106 (Colo. 1982) (en banc) (decided prior to *Greenmoss*).

81. Perhaps the best known possible example of this kind of case would be the alleged fact situation in Nixon v. Fitzgerald, 457 U.S. 731 (1982). *See supra* note 24.

82. 813 F.2d 384 (Fed. Cir. 1987).

83. *Id.* at 386.

content of a letter he wrote on official stationery to an agency assistant district director for investigations.[84] The Merit Systems Protection Board and the federal circuit found the letter to contain "insulting and abusive language disparaging Catholics, Hispanics and agency employees."[85]

The letter partially focused on a particular agency form, I-293, which was used nationwide by the Immigration and Nationalization Service to notify aliens of the holding of hearings and the dates and locations of those hearings.[86] The letter's references to this form may help account for why the letter was sent to a responsible internal official, rather than to a newspaper, for example, if any such explanation is required. The thrust of the petitioner's letter was much broader than a simple quibble over the drafting of some obscure internal government form.

The transition from a complaint above a form to a sweeping complaint about a broad, plainly controversial, government policy began with the petitioner's assertion that "[a]ll the I-293 accomplishes is to give an illegal alien more time to become further entrenched and hinder the Service efforts in removing him."[87] The focus of the letter then broadened to a level of panoptic generality: the petitioner's study of the history of predominantly Catholic countries had allowed him to conclude that "all them are corrupt, backward, beggarly countries."[88] The essential thrust of the letter, however, was unmistakable; that the Service is too lax, from the point of view of the broad national interest, in processing and deporting undocumented aliens, due to factors such as endemic, pervasive ignorance, disloyalty, or incompetence.

This brief summary of the letter in question fairly depicts its thrust. At points, the level of generality that is reached is nearly Weberian. It is clear that the writer was concerned preeminently with the merits of broad national policy, and not simply with the technicalities of forms, internal procedures, intra-office bickering, or individual cases and officers. It would also be disingenuous to claim that the subject of the undue laxity, or undue severity or oppressiveness, of treatment of alleged illegal immigrants along the Mexican border was not a matter of public interest in 1984, at least to a significant sector of the public.

Mings represents an obvious case, as it seems readily manageable on any theory of MOPIC speech, and can fall under the ready generalizability theory as well, as it seems impertinent to ask whether the border control agent who wrote the letter could have cheaply broadened the relevant scope of his focus. Additionally, the case seems manageable on the issue of MOPIC *vel non* on any of a variety of approaches. Unfortunately, the court of appeals reached a flatly contrary result. The court conceded that although the letter

84. *Id.*
85. *Id.* at 386, 388.
86. *Id.* at 386.
87. *Id.*
88. *Id.*

was understandably directed to a responsible agency official rather than to the public at large, that fact would not preclude a finding of MOPIC status.[89] The court concluded, however, that the content of the letter was more in the nature of a personal, internal agency grievance relating to a particular agency form, and that the petitioner's speech was therefore on a matter of only personal interest, rather than on a matter of public concern or debate.[90]

A fair reading of the letter as reported by the court of appeals makes the court's conclusion in this respect strained at best. Clearly the problem is that it is not easy to give the letter a fair reading. Certain statements in the letter are scurrilous. A fair minded court could read the letter and conclude that the Service did not act unreasonably in removing the petitioner from his position on other grounds. The letter itself suggests the petitioner's inability to perform satisfactorily in certain job-related respects.

What the court of appeals could have done instead, as *Connick v. Meyers*[91] makes quite clear, is to have decided the case against the speaker without the absurd conclusion that the actual content of the letter did not relate to a matter of legitimate public concern. Under *Connick,* as derived from *Pickering v. Board of Education,*[92] the court could have granted the fact that the petitioner's speech addressed a matter of public interest. The court could have then barred his recovery by finding, as a matter of law, that the employee's free speech interest in this case was outweighed by the Service's interest in the fair and efficient operation of its programs.[93] The court of appeals in this case, though well aware of this escape route,[94] chose not to use it, perhaps out of an unconscious distaste for the viewpoint expressed in the letter.

In any event, *Mings* can be fairly characterized as a rare aberration.[95] Few legal tests on central, frequently litigated matters can effortlessly account for all judicial opinions, without exception. The operation of the ready generalizability approach will be illustrated next by filling in the cells of the matrix of possibilities.

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89. *See id.* at 388 (citing Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 413 (1979)).

90. *See Mings,* 813 F.2d at 388.

91. 461 U.S. 138 (1983).

92. 391 U.S. 563 (1968).

93. *See* 461 U.S. at 142. Under Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), the government may prevail by showing that the same discipline would have been taken against the employee for reasons independent of his protected speech.

94. *See Mings,* 813 F.2d at 837, 838-39.

95. *Cf.* Jungels v. Pierce, 638 F. Supp 317 (N.D. Ill. 1986) *aff'd in part, rev'd in part,* 825 F.2d 1127 (7th Cir. 1987). In *Jungels,* the letter at issue was written to a newspaper by a part-time local civil service commissioner regarding the allocation of public funds to the city's Hispanic community. The trial court found that certain remarks and the tone of the letter in general disparaged Hispanics. *Id.* at 321. In view of the reasonable inference of bias and the possibility of disruptive litigation in the future pointing in part to the letter in question, the writer's discharge was upheld. But the court held this only after admitting that the letter at issue dealt with matters of public concern. *Id.*

III. Close Cases on the MOPIC Issue in the Context of Public Employment Discharge

One difficulty in testing the normative appeal of our approach is that the courts are not in a position to retroactively adopt this theory, and therefore their published opinions have often not focused on, or even reported, the actual language used by the speaker, but instead label to the general category the speech might be said to fall into. Rather than examining the degree of generality of the actual speech, some courts simply describe the speech at issue and do not reproduce the language employed. Not having the actual language, or excerpts therefrom, reproduced in the opinion, one can only guess as to how the MOPIC issue would be decided under the proposed theory in this Article. In some cases, though, a call can be hazarded.

As a reminder, the theory is intended only for the quite common, middle ground, close cases on which reasonable minds differ. The hope is not to show the unreasonableness of contrary judicial results, but to encourage more valuable speech activity and to reward or sanction the speaker in a given case, based on the speaker's reasonable utilization of the speech opportunities available under the circumstances.

With this caveat, we may consider the recent case of *Ohse v. Hughes.*[96] In this case, the plaintiff was terminated from his job as an Adult Probation Officer. From one perspective, it seems appropriate, based on the reported facts, to view the case as simply a garden variety intra-office squabble based on the speaker's own interests being thwarted because the situation was either caused or exacerbated by friction between the plaintiff speaker and the Chief Probation Officer.[97] The plaintiff's speech, however self-serving or otherwise questionably motivated, and however unrelated to the genuine causes of his dissatisfaction, bears some examination.

The appellate court, while not reproducing the language actually employed, indicated that the plaintiff detailed[98] serious abuses in a publicly funded probation office that were later admitted to be true by the chief of the office.[99] Ohse revealed the drinking of alcohol by probation employees during business hours, the falsifying of mileage charges to cover meal expenses, the inappropriate taking of sick and vacation days, situations where [chief probation officer] Hughes misappropriated public funds for unauthorized uses, and that members of the office were sleeping on the job.[100] While these alleged abuses might be considered not surprising or petty when viewed individually or even collectively, the Seventh Circuit found it clear that these

96. 816 F.2d at 1144 (7th Cir. 1987).

97. *See id.* at 1146.

98. Primarily to relevant supervisory personnel. *See id.* at 1146-47.

99. There should be no inference that speech cannot be on a matter of public interest if it is an untestable or false opinion.

100. *Id.* at 1151.

occurrences involved matters of "public concern which would trigger 'debate . . . vital to an informed decision making by the electorate.'"[101]

The crucial determinant under the ready generalizability theory would require an inquiry into whether, under the circumstances, the employee-speaker could, without distorting his message and without changing his own basic, personal capabilities, have significantly generalized his message, at low cost, so as to more clearly or significantly implicate the basic free speech values.[102]

In *Ohse,* apparently no significant low cost generalization was possible. It was not that the plaintiff's speech focused on isolated incidents or mere particular personalities, where a broader lesson was begging to be drawn. The theme of the plaintiff's speech appeared to describe a continuing, systemic pattern of modest corruption or abuse of the public trust. It is simply not clear where the plaintiff would be expected to go in terms of significant further generalization. Putting the matter in broader historical or sociological perspective would not ordinarily be expected of someone in the plaintiff's position. Any such exertion on the part of the plaintiff would seem gratuitous and contrived. Similarly, the plaintiff could reasonably have been chastised for broadening the audience for his accusations to include the general public at this stage, before the responsible officials had a chance to examine and evaluate his charges.

As has been demonstrated, there need be no fear that deciding close MOPIC issues in this fashion will allow culpable public employees to hide behind a smokescreen of talk on matters of public interest. The court may decide as a matter of law[103] that the interests of the plaintiff in speaking out on matters of public concern is outweighed by the government's interest, as employer, in efficiently organized public offices.[104] One can only assume, of course, that courts also take into consideration the public's interest in the speech, as well as the interests of the speaker, and that courts appreciate that the plaintiff's speech might tend to enhance, as well as impair, the efficient operation of the agency.[105]

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101. *Id.* (quoting Pickering v. Board of Educ., 391 U.S. 563, 572 (1968)).

102. *See supra* note 25.

103. *See, e.g., Connick,* 461 U.S. at 148 n.7, 150 n.10 (deciding as a matter of law, and in light of the entire record, that a government employee's inner office questionnaire concerning office policy involved, in part, an issue of public concern); Allen v. Scribner, 812 F.2d 426, 430 n.8 (9th Cir. 1987) (deciding as a matter of law that an entomologist's public criticism of an insect eradication project was of public concern.).

104. *See Ohse,* 816 F.2d at 1151 (quoting Knapp v. Whitaker, 757 F.2d 827, 839 (7th Cir.), *cert. denied,* 106 S. Ct. 36 (1985)). *See also* Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984) (finding government interest stronger when a federal employee orally criticized a budget reducing furlough plan at an employee meeting: "the part of a 'good government' partisan is no doubt very attractive as the last refuge of the incompetent ordiscontented"), *cert. denied,* 470 U.S. 1050 (1985).

105. As additional possible examples of close cases that may involve speech on MOPICs, under the proposed theory and as found by the court, consider Allen v. Scribner, 812 F.2d 426

As a further test of the ready generalizability theory, the related close cases may be considered in which the theory would find a MOPIC, but in which the court did not in fact so find. A possible example of this sort of case is *Smith v. Wythe-Grayson Regional Library Board.*[106] In *Smith,* the plaintiff alleged that she had been terminated from her position as a public librarian based at least in part on her constitutionally protected speech.[107] The court, however, held that her speech did not address a matter of public concern.[108] The court indicated in this regard that:

> at a Library Board meeting, Mrs. Smith felt the amount being offered to the library system by the United Way was not adequate and hardly worth pursuing. I believe that this kind of statement in reality does not deal with a matter of public concern in that the public would probably have little or no interest, other than tangentially, in the exact amount of money that came to the library system through the United Way.[109]

This appears to be a close case, and under our theory it is difficult to resolve without a more precise account of what the plaintiff actually said. Clearly, the plaintiff was not focusing essentially on some personal grievance.[110] The court may in fact be unfairly degeneralizing the speaker's remarks, as described above, by characterizing them as focused on "the exact amount of money" involved.[111] The court's own prior description seems to suggest the possibility that the speaker was, in a broader sense, advocating that the library system consider dropping out of the United Way entirely.[112] It may be said that the speaker's remarks could be generalized even further, by arguing that the logic of the library system's dropping out of the United Way should apply to other United Way participants as well. There is no indication, however, that the speaker was in a position to responsibly make such a generalization.

Smith may therefore represent a close case of speech that should be considered as being on a matter of public interest. Other recent public employee discipline cases may also fall into this category, despite the courts' holding otherwise. Representative examples may include *Fiorillo v. United*

(9th Cir. 1987) (protecting public criticism by state entomologist focusing on alleged understatement of extent of California medfly infestation); Wren v. Spurlock, 798 F.2d 1313 (10th Cir. 1986) (protecting request by teacher and nine others for official investigation of public school principal on thirty-five grounds), *cert. denied,* 107 S. Ct. 1287 (1987).

106. 657 F. Supp. 1216 (W.D. Va. 1987).

107. *Id.* at 1219.

108. *Id.* at 1220.

109. *Id.*

110. This does not mean that merely personal grievances are necessarily easily generalized, but that personal grievances may not be found to be matters of public interest, under any number of theories.

111. *Smith,* 657 F. Supp. at 1220.

112. *See id.*

States Department of Justice[113] and *Yoggerst v. Hedges.*[114] *Fiorillo* is of special interest because of the court's conclusion that "[i]t is the nature of the whole communication that must be reviewed to determine whether it is of 'public concern'—not sentences taken in isolation."[115] This rule has the appearance of noncontroversial common sense, but on reflection, it cannot be right.

Imagine a long speech in which the speaker utters exactly one sentence that, in isolation, was clearly and indisputably on a matter of public interest. The court may, under the *Fiorillo* approach, decide that the speech as a whole was not on a matter of public interest. If so, the case is over, and the employee loses. What if, however, the employer cared only about the single sentence that in isolation was on a matter of public interest? What if the employer fired the speaker for only that sentence, with no other grounds? The underlying policy logic of the case law and the values underlying the free speech clause would require the kind of interest balancing inquiry between employer and employee that is only triggered after the initial finding of speech on a matter of public interest has been found.

To balance out the examination of the public employment discipline cases, the categories of close cases in which the ready generalizability theory would yield a finding of no speech on a matter of public interest will be examined. The judicial resolution of the recent reported cases is mixed, with some courts finding speech on a MOPIC where application of the ready generalizability theory would have resulted in a finding of non-MOPIC speech. *McKinley v. City of Eloy,*[116] is representative of these cases. *McKinley* involved a probationary police officer who was dismissed for allegedly criticizing, in a news interview and a city council meeting,[117] the City's decision not to give police officers an annual raise.[118] The Ninth Circuit began by correctly refusing to judicially close the class of potential matters of public interest, recognizing instead the constitutional intent "to permit the public to decide for itself which issues and viewpoints merit its concern."[119] The Ninth Circuit may have erred, under this theory, by apparently generalizing the speech for the speaker itself.

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113. 795 F.2d 1544 (Fed. Cir. 1986) (petitioner's claim that prison was still saturated with corruption found by the court to be stale news).

114. 739 F.2d 293 (7th Cir. 1984) (petitioner's expression of happiness to co-worker concerning her superior's discharge not protected; the petitioner was penalized by Seventh Circuit for failing to overtly articulate assumptions that were presumably clear to the listener from previous conversations with the speaker).

115. *Fiorillo,* 795 F.2d at 1550. *See also* Greenberg v. Kmetko, 811 F.2d 1057, 1062 (7th Cir.) (comments made by speaker are to be considered as a whole), *reh'g granted, vacated en banc,* 820 F.2d 897 (7th Cir. 1987).

116. 705 F.2d 1110 (9th Cir. 1983).

117. *Id.* at 1115.

118. *Id.* at 1112.

119. *Id.* at 1114 (citing Cohen v. California, 403 U.S. 15, 24 (1971)).

Because the Ninth Circuit opinion does not indicate the level of generalization of the plaintiff's remarks, it is not entirely clear how broad the plaintiff's actual or fairly implied focus was, and how much breadth was simply supplied by the court on review.[120] To the extent that the plaintiff's speech focused on the strength of desire or need of the police officers for an annual raise, and their frustration, anger, or disappointment with the City over this issue,[121] his speech seems readily generalizable, hence not MOPIC speech under the theory. The court's own observation that at least beyond some point, "compensation levels undoubtedly affect the ability of the city to attract and retain qualified police personnel"[122] merely indicates how easily the speaker could have added, through relevant further generalization, to the clarity of the MOPIC issue, assuming his speech did not in fact address such issues.

A case bordering this category, and on which the Supreme Court has recently shed some light, is *Rankin v. McPherson.*[123] Plaintiff McPherson was terminated from her clerical position at a county constable's office when, upon learning of the attempted assassination of President Reagan, she stated to a co-worker, "If they go for him again, I hope they get him."[124] The trial court found that the language was seriously meant and not merely political hyperbole, that the plaintiff's language was not speech on a matter of public interest, and that the constable's office need not be "required to employ a person who 'rides with the cops and cheers for the robbers.'"[125] The Fifth Circuit reversed, however, finding the plaintiff's speech to be on a matter of public interest, and that her position was too ministerial to be expected to have significant potential for office disruption, efficiency, or morale.[126]

The Supreme Court in affirming the Fifth Circuit focused on the undoubted truth that "the life and death of the President are obviously matters of public concern."[127] The plaintiff's speech, however, was causally remote from the actual assassination event, or any subsequent events. Under the ready generalizability theory, her speech would, as a close case, be considered speech on a matter of public interest, unless several assumptions are made. If her remarks were simply a bare expression of preference, devoid of any even minimal attempt at elaboration, reasoning, justification, or explanation, a count could find that the speech was not on a matter of public interest. After all, the plaintiff's speech in such a case would be almost purely self-

120. *McKinley,* 705 F.2d at 1114.

121. Note that alleged employee frustration and morale concerns did not reach the level of matters of public interest in Connick v. Myers, 461 U.S. 138 (1983).

122. *McKinley,* 705 F.2d at 1114.

123. 107 S. Ct. 2891 (1987) (5-4 decision).

124. *Id.* at 2895.

125. *Id.* at 2902.

126. *Id.* at 2896.

127. *Id.* at 2897 (quoting the Fifth Circuit's opinion below, 786 F.2d at 1236).

referential, autobiographically reporting a certain mere undefended preference of the speaker, however intensely held. That the plaintiff simply feels strongly about some important hypothetical event need not in itself be a matter of public interest, and her own speech reporting her strong feeling need not be speech on a matter of public interest.

There is of course the possibility that the plaintiff would have elaborated upon, or generalized, her declaration but for her being situationally blocked from doing so, or that she did in fact so elaborate upon her comments. The theory does not require generalization when generalization was in fact prevented by immediate interrogation, by a speaker's supervisor. In addition, the possibility of antecedent generalization must also be recognized. In this case, the plaintiff testified without contradiction that her statement about the attempted assassination was made at the end of a discussion about the President's policies with a co-worker.[128] The preceding discussion by the plaintiff supplies generalization under the ready generalizability theory. It seems unlikely that the plaintiff's speech could in fact be easily generalized to a further degree, but that the plaintiff frivolously cast opportunities for further generalization away.[129] *McPherson* would under the ready generalizability theory therefore involve non-MOPIC speech only if the plaintiff's speech was a passing, unpursued, unintroduced remark, but should be considered MOPIC speech under the facts presented.[130]

The final category of the public employment discipline cases, which need not be dwelled upon, consists of close cases in which the proposed approach and that of the actual deciding court converge on a finding of speech not on a matter of public interest. An example of such a case is *Rowland v. Mad River Local School District*[131] In this case, the plaintiff Rowland's

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128. *Id.* at 2895.

129. The burden of showing no easy further generalization of the speech should logically rest on the speaker, as the party asserting the constitutional defense to the job discipline. However, for practical reasons, it seems best to require the employer to bear the burden of showing further generalizability, in some particular respect. Otherwise, the speaker is placed in the logically demanding position of having to negate an infinite set of possible further ready generalizations. For the Supreme Court's reluctance to impose a burden of proving a negative in another speech context, see Miller v. California, 413 U.S. 15 (1973) (seeking to relieve prosecution of the allegedly undischargeable burden of proving that the work claimed to be obscene was without any sort of redeeming social value).

130. For other examples of possible non-MOPIC speech under this theory, where the court found otherwise, consider Koch v. City of Hutchinson, 814 F.2d 1489 (10th Cir. 1987) (plaintiff's official investigatory conclusion that a particular fire involved arson); Greenberg v. Kmetko, 811 F.2d 1057 (7th Cir.) (plaintiff's expression of disagreement with various social casework decisions), *reh'g granted, vacated en banc,* 820 F.2d 897 (7th Cir. 1987); Johnson v. Town of Elizabethtown, 800 F.2d 404 (4th Cir. 1986) (challenge before Town Board by clerk as to use of facsimile stamp, notarization procedure, etc.); Collins v. Robinson, 568 F. Supp. 1464 (E.D. Ark. 1983) (plaintiff circulated memo to his superiors and other co-workers focusing on possible discipline of a superior officer who accused various jail employees of planning a walkout over salary issues), *aff'd per curiam,* 734 F.2d 1321 (8th Cir. 1984).

131. 730 F.2d 444 (6th Cir. 1984), *cert. denied,* 470 U.S. 1009 (1985).

contract as a public school guidance counselor was not renewed allegedly at least in part, because she informed school personnel of her bisexuality.[132]

While the rights of bisexual teachers may be considered a matter of public concern generally, and while this particular case may have become something of a local *cause celebre,*[133] this case illustrates the application of the ready generalizability theory. The plaintiff apparently reported her sexual preferences in a narrowly autobiographical, contextless way. Apparently the plaintiff declined the opportunity to tie her own circumstances to any broader concerns.[134] That the plaintiff chose to only disclose a personal fact rather than to disclose and elaborate or expound, in even a limited way, within the limits of her ability under the circumstances, is not without implication for the values underlying the free speech clause.[135]

IV. Close Cases on the MOPIC Issue in the Libel Law Context

The approach to the MOPIC issue in the defamation cases precisely parallels those cases discussed above in connection with the public employment discipline cases. Many of the recent cases, of which *Greenmoss*[136] is preeminent, have been referred to above, and the reader is invited to trace out the implications of the ready generalizability approach for any number of cases.

If enough confidence can be developed in the ability of this approach to sort out close MOPIC versus non-MOPIC cases in the defamation area, there may be a significant special payoff. It may then be possible to dispense with any consideration of the often difficult issue as to whether the plaintiff in a defamation case is a private figure or a public figure of some sort.[137]

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132. *Id.* at 448.

133. *See id.* at 452, 453 (Edwards, J., dissenting).

134. *See id.* at 449.

135. For additional cases in which the ready generalizability approach and that of the actual court concur in finding the speech not to be on a matter of public interest, see Gomez v. Texas Dep't of Mental Health and Mental Retardation, 794 F.2d 1018 (5th Cir. 1986) (statement by state mental health facility employee to employee of county outpatient center of new state policy that would place additional burdens on county center employee); Saye v. St. Vrain Valley School Dist. RE-1J, 785 F.2d 862 (10th Cir. 1986) (discussion by plaintiff teacher with two parents of defendant's allegedly inadequate allocation of student aide time); Altman v. Hurst, 734 F.2d 1240 (7th Cir.) (per curiam) (police officer disciplined allegedly for, *inter alia,* encouraging another officer to appeal her suspension), *cert. denied,* 469 U.S. 982 (1984).

136. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

137. See the distinctions drawn, or sought to be drawn, in Time, Inc. v. Firestone, 424 U.S. 448 (1976) (plurality opinion); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (plurality opinion). For the implication that the MOPIC versus non-MOPIC distinction is constitutionally more significant than the public figure versus private figure distinction, see Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion) (public had a high interest in whether magazines distributed by the plaintiff were legally obscene). One need not agree with the *Rosenbloom* plurality on the level of constitutional protection to be accorded defamatory speech on matters of public interest to agree that the alleged public figure status, or not, of the speaker is constitutionally insignificant. *See* Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103, 1106 (Colo. 1982) (en banc).

If the speech is on a matter of public interest, it may be worth a given level of protection through the free speech clause, regardless of the status of the plaintiff. If the speech is not on a matter of public interest, it should presumably receive a lesser degree of constitutional protection, even if the plaintiff in the libel action is a public figure. This approach would correspond with the underlying concern for the defense and pursuit of the values underlying the free speech clause. It would also dispense with the embarrassing legal fiction that public figures have consented to, or assumed the risk of, not merely harsh public evaluation, but also grossly negligent defamation.[138]

With the possibility of increased clarity and logic in the constitutional law of defamation at stake, consider a brief contrast in outcomes under the ready generalizability theory in two defamation cases, both of which involve allegations of organized crime associations. In *Mutafis v. Erie Ins. Exchange,*[139] the speech at issue was an insurance company employee's placing a memorandum in internal company claim files stating that Mutafis was "associated with mafia very heavily."[140] In *Philadelphia Newspapers, Inc. v. Hepps,*[141] the speech was that of a Philadelphia newspaper that, in a series of articles, asserted that Hepps had ties to organized crime and used those ties to influence Pennsylvania state governmental processes.[142]

Both of these instances of alleged defamatory speech focus on organized crime. Organized crime is undoubtedly a matter of public interest and concern. Yet under the ready generalizability theory, the speech in *Mutafis II* is best categorized as easy non-MOPIC speech, and the speech in *Hepps* as easily on a MOPIC. Neither is a close case appropriate for the ready generalizability approach. *Hepps* involved wide dissemination of speech illuminating alleged corruption in state government. Any plausible theory one cares to enlist must find this to be speech on a matter of public interest. *Mutafis II,* however, involved speech that was not intended for circulation at any point to more than a handful of insiders, and the speech had no institutional point or implication other than to discourage unwarranted financial exposure by the insurance company in the case of a single individual.

It is possible to argue that if *Mutafis II* can somehow be seen as a close case and therefore appropriate for our theory, the defendants' speech in *Mutafis II* should be classified as on a matter of public interest based on our theory, as it would be costly or impractical for the speaker in *Mutafis II* either to circulate his thoughts more widely—as to competitors—or to expand his remarks into an essay on the insidiousness of organized crime. All of this analysis demonstrates that the case is in fact not close, because

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138. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (plurality opinion).

139. 775 F.2d 593 (4th Cir. 1985) (per curiam) [hereinafter *Mutafis II*]. The prior, more factually detailed opinion in *Mutafis* is at 728 F.2d 672 (4th Cir. 1984) [hereinafter *Mutafis I*].

140. *Mutafis I,* 728 F.2d at 673.

141. 106 S. Ct. 1558 (1986) (plurality opinion).

142. *Id.* at 1560.

the institution of the confidential insurance files, in nature and purpose, is largely foreign to the service or exercise of our basic free speech values. The speaker may have bumped up against the speech-value enhancing limitations of the institution of the insurance company, but the confidential insurance company files, by their nature and purpose, have little to do with the aims underlying the free speech clause.[143]

CONCLUSION

The ambiguity of the concept of the public interest, and the difficulty of consistent application of this concept in close cases, provokes a certain natural impatience. The concept is widely used in the law,[144] however, and is in fact indispensible, in that it captures genuinely fundamental concerns. Any conceivable replacement for the concept would involve much the same difficulty of application. Disposing with the concept would not make the legal landscape less ambiguous and logical, but simply unrecognizable. This Article has therefore recommended a principled, yet pragmatic approach to resolving the increasing number of the most difficult sorts of issues involving this distinction in the important areas of public employee discipline based on speech, in defamation, and less explicitly, but by the same logic, in privacy cases.[145] The aim has been to lend some additional predictability and consistency to the decisions, while strategically promoting the values that lead us to constitutionalize free speech rights in the first place.

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143. For cases compatible with this result, in the context of credit reports rather than insurance company confidential files, see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511 (10th Cir. 1987).

144. For a sampling of uses in other legal contexts of the public interest versus private interest distinction, see Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987) (dispute over the proper characterization of interests in health and safety in preventing coal mining subsidence damage); Federal Communications Commission v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981) (noting the absence of a statutory definition for FCC's mandate to serve the public interest); Black Citizens for a Fair Media v. Federal Communications Commission, 719 F.2d 407, 411 (D.C. Cir. 1983) (same), *cert. denied,* 467 U.S. 1255 (1984); Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.) (upholding right of magazine to publish truths about former child prodigy in contravention of the latter's privacy rights), *cert. denied,* 311 U.S. 711 (1940); Warren & Brandeis, *supra* note 2, at 214 ("The right to privacy does not prohibit any publication of matter which is of public or general interest."); Note, *Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractors,* 36 AM. U.L. REV. 693 (1987).

145. *See* Warren & Brandeis, *supra* note 2, at 214; Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied,* 311 U.S. 711 (1940).